FOR ARGUMENT

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-423

PUYALLUP TRIBE AND RAMONA BENNETT,
Petitioners,

v.

DEPARTMENT OF GAME OF THE STATE OF WASHINGTON,
Respondent,

On Writ of Certiorari to the Supreme Court of the State of Washington

REPLY BRIEF FOR THE PUYALLUP TRIBE AND RAMONA BENNETT

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This brief replies to the briefs of Respondents Department of Game [hereinafter Game brief], Northwest Steelheaders Council of Trout Unlimited and Gary Ellis [hereinafter Steelheaders Brief], and of the Amici Curiae Purse Seine Vessel Owners Association, Puget Sound Gillnetters Association, West Coast Trollers Association, and the Northwest Trollers Association [hereinafter Amici Brief]. Our reply conforms to the format of our opening brief.

I

State Administrative Agencies and Courts Are Without Power to Adjudicate Tribal Entitlement to On-Reservation Fisheries and To Enforce The Decrees

The state chooses, at this late date, to make its principal stand by arguing that the Puyallup Reservation does not exist rather than contesting directly the proposition that state authorities lack power to regulate the tribal fishery on the reservation. Game Brief at 31-49. The existence of the reservation, however, was conceded by council throughout the trial,[1] recognized as fact by the trial court, FF XVI, Pet. Cert. App. D-17, and by the Washington Supreme Court in its decision under review here. 86 Wn.2d 664, 668, 548 P.2d 1058, 1063, Pet. Cert. App. B-6-7; *see id.* at 688-89, 548 P.2d at 1074, Pet. Cert. App. B-45 (Stafford, C.J., with Wright, Utter & Horowitz, J.J., concurring). Indeed, the whole matter was settled by the separate reservation decision of the Ninth Circuit, *United States* v. *Washington,* 496 F.2d 620 (9th Cir.), *cert. denied.* 419 U.S. 1032 (1974), compiled on a record containing a great deal more than what counsel chooses to present for the first time in this proceeding.[2] *See* Game Brief at 33-49.

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[1] App. 20-21 ("Mr. Mackie: . . . [W]e have to operate on the premise that there is a reservation unless the United States Supreme Court grants certiorari on [the Ninth Circuit reservation decision] and reverses the same." Certiorari was denied. 419 U.S. 1032 (1974)); R. 1136 ("Mr. Mackie: . . . [W]ith reference to the reservation I should clarify, the State is now in a position of having a decision against it by the 9th Circuit which we believe is in error but at this stage of course we're bound by it."). Nowhere in its brief before the Washington Supreme Court did the Department of Game assert that the reservation had been terminated.

[2] United States v. Washington, No. 39-71C3 in the district court, was tried on a record consisting, among other things, of a 48-page, 214 paragraph Plaintiff's Request for Admissions detailing a complete history of the Puyallup Reservation.

Nor does the record permit a factual escape from the proposition that we are dealing with an on-reservation Indian steelhead fishery. The trial court found as a fact that the tribe intends to concentrate its fishery within the boundaries of the reservation, Pet. Cert. App. D-17, and the only testimony on the point is that 90-100 percent of all future harvests will be on the reservation (App. 79-80); *cf. DeCoteau* v. *District County Court,* 420 U.S. 425, 428-30 & n.3 (1975). None of the Indian net fishing for the 1973-74 season here at issue occurred off the reservation. *Compare* R. 485 *with* the map appearing in the Game Brief at 75. *See also* App. 79-80; R. 826. The correct factual hypothesis, accepted by the state Supreme Court and beyond contradiction here, is that "substantially all" of the Indian catch of steelhead occurs on-reservation. 86 Wn. 2d at 688, 548 P.2d at 1074, Pet. Cert. App. B-45 (Stafford, C.J., with Wright, Utter, & Horowitz, J.J., concurring); *see id.* at 668-69, 548 P.2d at 1063, Pet. Cert. App. B-6-7.

With the reservation established and the fishery fixed on the reservation, Respondents are skewered decisively by the propositions that Article II of the Treaty of Medicine Creek reserved exclusive fishing rights on the reservation to the tribe and that the state lacks power to regulate an on-reservation fishery. *See* Opening Brief for the Puyallup Tribe and Ramona Bennett 20-26. It is suggested (Game Brief at 48-49) that the Public Law 280 prohibition against state adjudication of tribal treaty fishing rights can be overcome by the simple expedient of declaring more than three-fourths

of the harvestable fish in the river exempt from the treaty. This exercise in circularity reduces the rights, "control and regulation" promised by Public Law 280 to the tribe *pro tanto* to the extent the state chooses to withhold it. Nor is the case for state power enhanced by citation (Game Brief at 47) to the opinion in *United States* v. *Finch,* 395 F. Supp. 205 (D. Mont. 1975), holding that the Big Horn River crossing the Crow Reservation is not Indian trust land for purposes of fishing regulation, for the simple reason that the Court of Appeals reversed on precisely this point. —— F.2d ——, No. 75-2149 at 14-16 (9th Cir. Dec. 22, 1976), *petition for cert. filed,* 45 U.S.L.W. 3619 (U.S. Mar. 15, 1977) (No. 76-1206). *See also Quechan Tribe* v. *Rowe,* 531 F.2d 408, 410 (9th Cir. 1976). All this overlooks the further proposition, equally decisive, that the State of Washington and the Game Department have litigated and lost the issue of tribal control of the on-reservation fishery. *See* Opening Brief of the Puyallup Tribe and Ramona Bennett 35-38.[3]

II

Indian Fishing, Even When Off-Reservation, Can Be Curtailed by the State Only Upon a Compelling Justification of Conservation Necessity

Neither decision below purports to justify the assumption of on-reservation regulatory powers and the allocations decreed as instances of conservation neces-

[3] The law of the case argument on the reservation status, also raised here for the first time (see Game Brief at 45-46), founders on the proposition that the existence of the reservation was pretermitted expressly by this Court in *Puyallup I.* 391 U.S. at 394 n.1; *see* Satiacum v. Washington, 414 U.S. 44 (1973). *See also* Hartford Life Ins. Co. v. Blincoe, 255 U.S. 129, 136 (1921); 1B Moore's Federal Practice ¶ 0.404[10], at 572-73.

sity within the meaning of *Antoine* v. *Washington,* 420 U.S. 194, 207 (1975). The record on this score, in an exhibit prepared by the Game Department (Exh. 74-2, App. 93; *see* R. 148-49, 170-74), scarcely could be clearer: the total Indian steelhead catch on the Puyallup River during the period 1953-1973 (including some years when injunctions were in effect) amounted to 28,328, an average of 1416 fish per year. The sportsmen have caught approximately 11,058 fish per year. The 1400 or so fish per year taken by the Indians averages out to a little more than 10 percent of the harvestable steelhead on the river as computed by the trial court (FF XII, Pet. Cert. App. D-14-15) or 20 percent of the harvestable natural steelhead computed by the trial court (*Id.*). In a single year (1960) by a small margin (approximately 1,200 fish) the Indian catch exceeded the annual catch figure for the tribe (3310 or 3280) fixed initially by the trial judge. *See* FF XXII, Pet. Cert. App. D-19, Order and Judgment, Pet. Cert. App. E-3. This empty conservation threat recedes still further if the issue is seen [4] as whether a virtually nonexistent off-reservation fishery must be controlled for conservation reasons.

These catch figures are not overcome by unsupported assertions of tribal overfishing [5] or by snippets of record references (*see* Steelheaders Brief at 23-26) that are either miscast or now thoroughly stale. *See* Opening Brief for the Puyallup Tribe and Ramona Bennett at 11-13. The further argument pressed by the

[4] As it properly is, *see* Puyallup Tribe v. Department of Game, 391 U.S. 392, 399 (1968).

[5] There is considerable evidence in the record confirming the tribe's commitment to conservation. R. 1103-04, 802; App. 79, 83; Exh. 74-P; 74-Q; *see* R. 489.

Steelheaders (Brief at 26-30) and the state (Game Brief at 49-50), that the resource must be protected against multiple management, is simply another way of saying the reservation status is meaningless and tribal authority over on-reservation fishing is subject to the good will and heavy hand of state domination. That is also another way of repudiating the specific commitments of the Treaty of Medicine Creek and the general commitment of the Congress to principles of tribal self-government. *See* Opening Brief of Puyallup Tribe and Ramona Bennett at 22-24.

III

Tribal Sovereign Immunity Precludes State Courts From Adjudicating Tribal Community Fishing Rights

The tribe's sovereign immunity arguments (Opening Brief at 31-35) are neither distinguished, refuted, nor scarcely addressed by Respondents. The reason is that the tribe's objections are unanswerable. The Game Department does assert that the State "is seeking to determine the extent to which it can apply its regulatory powers with relation to fishing activities by individual members of the Puyallup Tribe. When the scope of that power has been defined, the State can then seek remedies against individual Indian fishermen who violate those regulations." Brief at 19. Yet, the relief sought and secured in this case has been aimed solely at the tribe and its chief executive officer. The original Order and Judgment allocates the community fishery and directs the tribe to file a list of fishermen and make reports. Pet. Cert. App. E 2-5. In the exercise of its continuing jurisdiction, the Pierce County Superior Court has issued a series of orders aimed at the tribe and the tribal council. *See* Opening Brief at 8-9. The

effect is to subject the tribe itself and its officials, and their powers as regards the tribal fishery, to the continuing mandates of the Superior Court. The state need never again seek relief against individual fishermen when the same result can be achieved by ordering the tribe, under threat of contempt for its officers, to close the fisheries. Subjecting the tribe to suit on these grounds offends settled principles of sovereign immunity. *E.g., United States* v. *United States Fidelity & Guaranty Co.,* 309 U.S. 506, 512 (1940).

IV

The State and the Game Department Are Barred by Principles of Collateral Estoppel from Relitigating the Issue of State Power to Regulate On-Reservation Fishing

Respondents' and the amici's briefs demonstrate, far more convincingly than simple assertions by the tribe, an unswerving determination to reargue a wide variety of propositions decided adversely to them by various courts in recent years. This Court is asked to reexamine the decision in *Department of Game* v. *Puyallup Tribe* (II), 414 U.S. 44 (1973) (Game Brief at 51), for no discernible reason other than a change in membership of the Court, to reopen the Puyallup Reservation case, *United States* v. *Washington,* 496 F.2d 620 (9th Cir.) (per curiam), *cert. denied,* 419 U.S. 1032 (1974), without benefit of the record compiled there, and to reject, again without benefit of a record, most of the legal premises of Judge Boldt's rulings in *United States* v. *Washington,* 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd,* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976).

Simply put, the facts are that prior to the Superior Court decision in the instant case federal courts, on

two occasions where the state was a party, ruled that state agencies lacked power to regulate on-reservation fishing. This was true in Judge Boldt's case (384 F. Supp. at 341) and in the Ninth Circuit's reservation decision (496 F.2d at 620) where it can safely be said that the chief issue in the case involved tribal power to regulate the Puyallup River steelhead fishery. Notwithstanding these prior adjudications, the State Superior Court (Pet. Cert. App. C-51) and Supreme Court in turn (86 Wn.2d at 669, 548 P.2d at 1063, Pet. Cert. App B-7) approved on-reservation regulation of the tribal steelhead fishery.

The principles of repose represented by res judicata and collateral estoppel, expressed as full faith and credit in the interstate context, 28 U.S.C. § 1738, surely put a halt to the relitigation attempted here. *See Kalb* v. *Feuerstein,* 308 U.S. 433, 440 & n.12 (1940); *Stoll* v. *Gottlieb,* 305 U.S. 165, 172 (1938); R. Cramton, D. Currie & H. Kay Conflict of Laws 659 (2d ed. 1975). The reservation question is closed and along with it the state's power to regulate within the reservation boundaries. The Steelheaders suggest (Brief at 30) that as nonparties they can litigate anew the question of reservation status. The law is to the contrary, *see City of Tacoma* v. *Taxpayers,* 357 U.S. 320, 340-41 (1958), and for good and sufficient policy reasons. If a ruling against the state did not foreclose objections by private citizens, Indian tribes would be perpetually on the defensive rearguing issues of tribal or reservation status. Indeed, the complaint filed in the reservation case in the federal courts named one sportsmen's group as a defendant (note 2, *supra*), only to have two others emerge in this case (including the Steelheaders) to reargue the reservation issues.

V

The Issue of Treaty Entitlement to Hatchery Steelhead Is Not Before the Court and Is Unnecessary to the Decision

We interpret the Steelheaders' Brief (at 14, 18-19, A1-A3) charitably as expressing annoyance at the tribe for not seeking certiorari on the issue of treaty entitlement to hatchery steelhead while conceding that as a prevailing party it could not have sought review here. *See New York Telephone Co.* v. *Maltbie,* 291 U.S. 645 (1934). The various reasons advanced by Respondents in support of the argument that this Court should review an issue not raised in the Petition add up to the proposition that the question of treaty entitlement to hatchery fish is important, which none would deny. Indeed, the issue is so important that it manifestly should not be decided on this record sharply curtailed by the scope of the issues (a single species on a single river) and by repeated evidentiary rulings curtailing tribal evidence relevant to the disposition. *See* Opening Brief for the Puyallup Tribe and Ramona Bennett at 39-40. *Compare* Exh. 74-I *with* R. 1137-39 (excising from the exibit those pages dealing with environmental damage to the river).[6] Nor, decisively, should the issue be reviewed on a record compiled by a state court without power to make the decision.

Respondent Steelheaders take offense also (Brief at 14) at the decision of the district court of the Western

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[6] As counsel for the Steelheaders put it to the trial court:

> [W]e are here concerned with a remand concerning the Puyallup River system. It is irrelevant to the Puyallup River system what may have been done on the Columbia River or other places involved in the Pacific Northwest.

R. 702; *see* R. 324, 328, 703, 717, 991-92, 996, 1002.

District of Washington of August 13, 1976, granting a preliminary injunction against state officers restraining them from excluding hatchery reared fish from tribal allocations pending a full trial in Phase II of the *United States* v. *Washington* litigation. *See id.,* App. A-8 to A-9. Apart from misstating the possible collateral estoppel effect of the instant litigation on the Puyallup Tribe in that proceeding,[7] Respondents are asking this Court to prejudge not only the propriety of the August 13, 1976 injunction, from which an appeal has been taken by the state,[8] but also major aspects of the Phase II litigation yet to be tried. This is consistent with Respondent's view of this case as a vehicle for undoing all of the legal damage done to them by numerous courts in the last several years.

Amici commercial fishermen point out (Brief at 10-15) certain conflicts between federal and state decisions on various Indian fishing issues. This happens to be true although many of the conflicts were occasioned

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[7] The August 13, 1976 memorandum decision of the district court does recite at length the repeated rulings at trial in the instant case excluding tribal evidence pertinent to the natural-hatchery issue (*Id.* at 11-12). The court holds that the Puyallup Tribe would not be foreclosed by *res judicata* from litigating legal issues regarding environmental degradation of the watershed and treaty entitlement to hatchery fish (CL-8 at 26) and concludes (CL-9 at 26):

> To the extent that the Puyallup Tribe may be collaterally estopped from litigating before this Court fact issues actually litigated during the *Puyallup III* trial (for example, questions concerning the historic sizes of the natural and hatchery steelhead runs on the Puyallup River and the sources of funding for those runs), the issues are best decided as they arise during pending Phase II litigation.

[8] United States v. Washington, No. 76-3757 (9th Cir.), filed October 8, 1976.

by suits against state agencies by commercial fishing interests seeking to attack collaterally the decisions of the federal district court. Various issues in these controversies are now before the courts,[9] and none of them are remotely presented here. The further suggestion by Amici (Brief at 7-10) that this Court ought to proceed, willy-nilly as it were, to exclude hatchery reared salmon from the reach of all Indian treaties is bold even by the standards of this case since there is neither a pleading nor shred of evidence in the record addressing treaty entitlement to hatchery reared salmon. Lastly, amici suggest (Brief at 16-17) that the Puyallup Tribe already has argued here the issue of treaty entitlement to hatchery steelhead, which manifestly we have not done, and will not do so, unless the Court advises us that the normal rules for the presentation of questions are suspended in Indian fishing cases.

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[9] United States v. Washington, Nos. 75-2835, 76-1042 (9th Cir.) (raising the question, among others, whether a state agency can resist compliance with federal court orders on the ground that state law precludes the closure of fisheries for any reason other than conservation (i.e., to allow sufficient escapement to the Indian fishing grounds)); Washington State Commercial Passenger Fishing Vessel Ass'n v. Tollefson, 87 Wn. 2d 417, 553 P.2d 113 (1976), *rehearing granted,* Nov. 4, 1976.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of the State of Washington should be reversed with directions to dismiss.

Respectfully submitted,

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